

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Trinity Health-Michigan, d/b/a
St. Joseph Mercy Oakland Hospital,

Respondent

and

CASE: 07-CA-161375

Council 25, Michigan American
Federation of State, County and
Municipal Employees (AFSCME),
AFL-CIO

Charging Party

**BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER**

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STATEMENT OF THE CASE

On May 25, 2017, Administrative Law Judge Christine Dibble (“ALJ”) issued a Decision and Recommended Order (“Decision”) finding that Respondent St. Joseph Mercy Oakland Hospital (“SJMO” or “Hospital”) violated Sections 8(a)(1) and (5) of the Act by removing allegedly covered positions and work from the bargaining unit.

In reaching this conclusion, the ALJ disregarded plain language contained in the parties’ collective bargaining agreement (“CBA”). The CBA’s recognition clause expressly *excludes* “licensed associates” from the bargaining unit. This unambiguous language mandated that the *new* position of *Licensed* Pharmacy Technician, a job which was created in response to a licensing requirement imposed by state law, be excluded from the bargaining unit.

In September 2014, the State of Michigan passed legislation that required all pharmacy technicians in the state to obtain and maintain a state-issued license. The collective bargaining agreement between the Hospital and Charging Party, American Federation of State, County and Municipal Employees, AFL-CIO, Council 25, Local 1820 (“AFSCME” or “Union”) has always excluded “licensed associates” from the bargaining unit since 1971.

The new position of “Licensed Pharmacy Technician” was created after state law made it illegal for pharmacy technician work to be performed by any unlicensed individual. The CBA did not permit the inclusion of this licensed position in the bargaining unit. This contractual mandate was discussed between the Hospital and the Union several times for nearly one year.

Despite the clear contractual mandate to exclude, the ALJ inexplicably found that the CBA’s recognition clause does not “exclude the licensed pharmacy technicians from the bargaining unit.” (ALJD p. 11, lines 22-24). This is plain error. The CBA explicitly requires exclusion of this job. Reversal is required.

The Hospital did not take any unilateral action that was not required by or consistent with the CBA and state law. The Hospital did not modify the scope of the unit or change the recognition clause. By operation of logic and standard rules of contract interpretation, the CBA required the exclusion of this new licensed position. This is the *only* outcome that is mandated by the clear and unambiguous language of the CBA. In fact, it would have been a unilateral modification of the scope of the bargaining unit if the Hospital had ignored the clear and unmistakable language of the CBA and required inclusion of this licensed job classification in the bargaining unit.

The ALJ committed several additional errors.

The ALJ erred in finding that the Union did not waive its right to bargain over the scope of the bargaining unit. The recognition clause explicitly excludes “licensed associates” from coverage. The CBA’s plain and obvious language constitutes a waiver under Board precedent. The ALJ’s finding that there was not a waiver over the exclusion of licensed employees is nonsensical.

The ALJ erred in holding that the Hospital had a duty to bargain over the recognition clause’s exclusion of the Licensed Pharmacy Technician jobs. Board law is clear that the duty to bargain over the scope of a recognition clause is a permissive subject of bargaining. The Hospital had no duty to bargain over whether to include a licensed job, the new Licensed Pharmacy Technician role, in the already defined bargaining unit.

The ALJ also erred in focusing on whether pharmacy technicians’ job duties before and after licensing were dissimilar. This has nothing to do with the clear exclusionary requirement of the CBA. Further, this analysis is factually unsupported. The record shows that the new position is enhanced and dissimilar.

Finally, the ALJ erred in finding that the unfair labor practice charge in this matter was timely. Section 10(b) of the National Labor Relations Act (“NLRA” or “Act”) mandates that “no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” 29 U.S.C. § 160(b).

The ALJ acknowledged Board law holding that the Section 10(b) six month period begins to run when the Union has clear notice of the unfair labor practice. The charge in this case was not filed until October 5, 2015, nearly a year after the Union admitted to have clear notice, and seven months after the Union’s grievance challenging the Hospital’s actions. The unfair labor practice and corresponding Complaint in this matter are time-barred under Section 10(b) of the Act as a matter of law.

QUESTIONS PRESENTED

- I. DID THE ALJ ERRONEOUSLY DECIDE THAT THE COMPLAINT IN THIS MATTER WAS TIMELY UNDER SECTION 10(b) OF THE ACT, WHERE THE UNION FILED ITS CHARGE MORE THAN SIX MONTHS AFTER IT RECEIVED CLEAR NOTICE OF THE EVENTS GIVING RISE TO THE ALLEGED UNFAIR LABOR PRACTICE?**

Respondent answers, “yes.”

- II. DID THE ALJ ERRONEOUSLY DECIDE THAT THE RESPONDENT VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT WHEN IT EXCLUDED THE LICENSED PHARMACY TECHNICIAN POSITION FROM THE BARGAINING UNIT IN ACCORDANCE WITH THE EXPRESS TERMS OF THE PARTIES’ COLLECTIVE BARGAINING AGREEMENT?**

Respondent answers, “yes.”

- III. DID THE ALJ ERRONEOUSLY DECIDE THAT THE UNION WAIVED ITS RIGHT TO CHALLENGE THE DEFINITION OF THE BARGAINING UNIT WHERE THE PARTIES PREVIOUSLY AGREED TO THE PROPER SCOPE OF THE UNIT?**

Respondent answers, “yes.”

INTRODUCTION

The material facts of this matter are not in dispute. This case involves an untimely unfair labor practice charge filed by the Charging Party, American Federation of State, County and Municipal Employees, AFL-CIO, Council 25, Local 1820 (“AFSCME” or “Union”) on October 5, 2015. This case also involves a Decision and Recommended Order from Administrative Law Judge Christine Dibble (“ALJ”) which disregards the plain and ordinary meaning of the parties’ collective bargaining agreement (“CBA”), rejects long-standing Board precedent, and makes findings of fact and law that are contrary to the undisputed record and common sense.

Since 1971, the CBA between the Union and Respondent St. Joseph Mercy Oakland Hospital (“SJMO” or “Hospital”) has expressly excluded “licensed associates” from the bargaining unit. In September 2014, the State of Michigan enacted PA 285, a state law that required all pharmacy technicians in Michigan to obtain a state-issued license. The law prohibited and made it illegal for any individual who did not possess a license to perform pharmacy technician work. Prior to the enactment of PA 285, Pharmacy Technicians at the Hospital were unlicensed and covered by the parties’ CBA.

In light of the new licensing requirements of PA 285, the Hospital needed to create a new job classification for licensed Pharmacy Technicians. The need for a new classification was first communicated to the Union on October 20, 2014. It was the subject of several additional meetings between the Hospital and Union.

On October 5, 2015, the Union filed the instant unfair labor practice charge alleging that the Hospital somehow violated the parties’ CBA when it *abided by* the CBA’s express terms and excluded the newly created *Licensed* Pharmacy Technician position from the bargaining unit.

On July 16, 2016, Administrative Law Judge Christine Dibble (the “ALJ”) held a one-day hearing. In the Decision and Recommended Order (“Decision”), the ALJ disregarded the plain and ordinary meaning of the CBA’s recognition clause, stating “I do not find that the CBA’s language unambiguously and explicitly excludes licensed pharmacy technicians from the bargaining unit.” (ALJD p. 13, lines 4-5). The ALJ’s Decision focused on witness testimony regarding changes in the job duties of Pharmacy Technicians before and after the state-mandated licensing requirement went into effect.

In finding that the Hospital violated Sections 8(a)(1) and (5) of the Act, the ALJ erroneously characterized the dispute as one involving a *reclassification* of the Pharmacy Technician position. The ALJ relied on this faulty premise in concluding that the job duties of the Licensed Pharmacy Technician position were not sufficiently dissimilar from the unlicensed Pharmacy Technician position. The ALJ’s erroneous application of the facts to the law also led her to incorrectly determine that the Union did not waive its right to contest the exclusion of the Licensed Pharmacy Technician position from the bargaining unit because the scope of the unit is a permissive subject of bargaining as a matter of law.

The ALJ also erred in finding that the Union timely filed its unfair labor practice. The ALJ correctly stated that “[t]he 10(b) period begins to run when the aggrieved party has ‘clear and unequivocal notice of a violations.’” However, she found that the unfair labor practice occurred on October 1, 2015, the date the Licensed Pharmacy Technicians were excluded from the unit. (ALJD p. 9, lines 6-9).

The undisputed facts establish that in October 2014, the Union had clear and unequivocal notice that PA 285 required the Hospital to create a Licensed Pharmacy Technician job that the

CBA required be excluded from the unit. The Union's unfair labor practice charge in this case was untimely and should have been dismissed pursuant to Section 10(b) of the Act.

STATEMENT OF FACTS

A. The Parties

Respondent St. Joseph Mercy Oakland ("SJMO" or "Hospital") is a teaching community hospital located in Pontiac, Michigan. (Tr. 128).¹ SJMO is part of the Trinity Health System, which is the second largest Catholic healthcare organization in the United States. (Tr. 126-27). SJMO employs approximately 2,800 individuals, of which approximately 610 SJMO service support workers are represented by the Charging Party, American Federation of State, County and Municipal Employees, AFL-CIO, Council 25, Local 1820 ("AFSCME" or "Union"). (Tr. 127-128, 186).

SJMO employs Pharmacy Technicians to work in the inpatient and retail pharmacies at the Hospital. (Tr. 85). The SJMO retail pharmacy employs five of the twenty-nine total Pharmacy Technicians at SJMO. (Tr. 87). The retail pharmacy functions similarly to a retail drug store such as Walgreens or CVS. (Tr. 86). Pharmacy Technicians in the retail division assist the pharmacist in procuring doses from stocked medication, prepare and bottle the doses, and assist the customers when they pick up the medication. (Tr. 86).

The SJMO inpatient pharmacy employs twenty-four of the twenty-nine Pharmacy Technicians at SJMO. (Tr. 87). The five primary functions of the inpatient Pharmacy Technicians include: (1) compounding drugs in the IV room; (2) delivering medications into the areas of the Hospital; (3) preparing medications for delivery at the pharmacy counter; (4) delivering and stocking Pyxis machines, the "automatic teller" machine for the drugs; and (5)

¹ Witness testimony from the official trial transcript is cited as "Tr." and followed by the applicable page number. Exhibits introduced by Counsel for the General Counsel at trial are cited as "GC Ex." Exhibits introduced by Respondent SJMO at the trial are cited as "R Ex.".

handling the preparation of narcotics stored in the Pyxis machine in the controlled substance vault. (Tr. 87-8).

B. The CBA's Recognition Clause Excludes "Licensed Associates"

In 1971, the parties negotiated a collective bargaining agreement that explicitly excludes licensed associates from the bargaining unit. (GC Ex. 10). The Recognition Clause has remained unchanged since it was originally negotiated. (Tr. 52). The Recognition Clause covers:

All nonprofessional associates, including technical associates, Carpenters, Plumbers, Electricians, Boiler Operators, Painters, Maintenance Mechanics and Technicians, Health Unit Coordinators, clerks in the following departments: Medical Records, Nursing Services, Laboratory, Communications, Buildings and Grounds, Physical Therapy, Radiology, Food Service and Environmental Services, and/or all classifications set forth in Article XIX, Job Titles and Pay Grades, but excluding Public Safety Officers, registered associates, licensed associates, professional associates, temporary associates, confidential associates, supervisors, students, office clerical and secretarial associates, clerical associates reporting to the Business Office, and all other clerical associates not specifically included herein.²

(GC Ex. 10, emphasis added).

When the parties negotiated the CBA in 1971, the parties agreed to *explicitly include* only two licensed job classifications, Electricians and Boiler Operators. The CBA explicitly excludes all other licensed positions. (Tr. 52, 54; GC Ex. 10).

Prior to the first CBA between the parties, Michigan law already required the licensing of both electricians and boiler operators. Since 1956, the State of Michigan has required electricians to possess a valid electrical journeyman's license. *See Public Act 217 of 1956; MCL 339.883d*. State law also required boiler operators to maintain a valid license since 1965. *See Public Act 290 of 1965; MCL 408.751 et seq*. Thus, when these two job titles were expressly included in the

² References to "associate" and "colleague" in the CBA and elsewhere are understood by the parties to be synonymous with the term "employee."

bargaining unit, the parties did so knowing they were licensed position. However, the parties expressly excluded all other licensed associates.

Articles XVIII and XIX (the Wage rates and tables) of the CBA identify the job classifications included within the bargaining unit. (GC Ex. 10). Other than the Electrician and Boiler Operator jobs, Articles XVIII and XIX do not identify or include any other licensed positions at the Hospital.³ Indeed, these Articles only list non-licensed job classifications covered by the Recognition Clause, including the previously unlicensed (but certified) pharmacy technician job classifications, “Pharmacy Tech In Pt Cert” and “Pharmacy Tech Out Pt Cert.” (Id).

SJMO employs approximately 1,100 employees in licensed positions that are expressly excluded from the unit based on the clear and unambiguous terms of the Recognition Clause. These job classifications include, but are not limited to, Registered Nurses, Physicians, Physician Residents, Respiratory Therapists, Respiratory Technicians, Radiologists, Radiology Technicians, Social Workers, Pharmacists, Speech Pathologists, Physician Assistants, Nurse Practitioners, and Licensed Practical Nurses (LPNs). (Tr. 131-33).

C. The State of Michigan Passes PA 285 of 2014, Requiring All Pharmacy Technicians To Possess A Valid License

The State of Michigan, not the Hospital, imposed the requirement that pharmacy technicians must obtain and possess a license. On September 23, 2014, Michigan enacted Public Act 285 of 2014 (“Public Act 285” or “PA 285”). (GC Ex. 2). Public Act 285 amended the

³ During the hearing, Counsel for the General Counsel introduced a draft Maintenance Technician job description at the hearing (GC Ex. 5) as purported evidence that Maintenance Technicians are required to possess a journeyman’s license. Counsel for the General Counsel’s reliance on this draft job description is misplaced and it should be excluded from the record, as it has not been adopted or implemented by the Hospital. Indeed, the ALJ did not reference or rely on the Maintenance Technician position in the Decision and Recommended Order. Regardless, unlike the Licensed Pharmacy Technician position, the Maintenance Technician position is explicitly *included* in the Recognition Clause. (GC Ex. 10; Tr. 59).

Michigan Health Code to require that all pharmacy technicians operating in the State of Michigan obtain and possess a license from the Michigan Board of Pharmacy. *MCL 333.17711* (“Beginning October 1, 2015, an individual shall not serve as a pharmacy technician unless licensed or otherwise authorized by this article”) (emphasis added). Pharmacy technicians who do not possess a valid license from the State of Michigan cannot legally practice or perform pharmacy technician functions at SJMO or any other pharmacy in the State. (Tr. 81, 129).

Without a license issued by the State of Michigan, a person may not function as a pharmacy technician. Pursuant to MCL 333.17739, only a licensed pharmacy technician who practices under the supervision and personal charge of a pharmacist is permitted to perform the following essential functions of the pharmacy technician position:

- assist in the dispensing process
- handle transfer of prescriptions, except controlled substances
- dispense compound drugs
- prepare or mix IV drugs
- contact prescribers for order clarification, not including drug regimen review or clinical or therapeutic interpretation
- receive verbal prescription orders, except for controlled substances

Id.

The Michigan Department of Licensing and Regulatory Affairs (“LARA”) regulates and enforces the terms and conditions of the pharmacy technician licensing requirements . (GC Ex. 2; Tr. 91). LARA utilizes United State Pharmacopeia (“USP”) 797 regulatory standards to ensure that safety and minimum standards of patient care are being met by pharmacy technicians. (Tr. 90-95). Pharmacy technicians who fail to comply with the regulatory requirements promulgated

by LARA and USP 797 face disciplinary measure and potential revocation of the state-issued license. (Id).

Based on these state law mandates, the Hospital created a new job and job description for Licensed Pharmacy Technicians.

D. The Union Is Given Clear And Unequivocal Notice That The Licensed Pharmacy Technician Job Classification Would Be Excluded From The Unit And Meets With The Hospital Regarding Its Impact

On October 20, 2014, and on several dates thereafter, the Hospital met with the Union leadership to inform them of the new law and the resultant creation of a new Licensed Pharmacy Technician position containing the job requirements imposed by statute. The Hospital told the Union that the Recognition Clause mandated the exclusion of this licensed pharmacy technician job. (Tr. 133). SJMO discussed and bargained with the Union over the impact the new law would have. (Id). The Hospital wanted to address any questions or comments the Union had about the placement of this new position outside the existing unit. (Tr. 142).

On October 20, 2015, the Union filed the unfair labor practice charge which forms the basis of the Complaint in this matter. (GC Ex. 1). Under Section 10(b) of the Act, the alleged unfair labor practice in this matter must have occurred on or after April 5, 2015 in order for the Charge to be timely. The Hospital's clear and unequivocal notice to the Union that the Licensed Pharmacy Technician position would not be included in the bargaining unit was provided on multiple occasions prior to April 5, 2015. The unfair labor practice in this matter is untimely.

i. October 20, 2014: The Union Admits That It Had Clear And Unequivocal Notice That The Licensed Pharmacy Technician Position Would Be Excluded From the Bargaining Unit

On October 20, 2014, the Hospital requested a meeting with Local 1820 President Carol Bass, Vice President Octave LeDuff, and Secretary-Treasurer Toni Jordan, to discuss the recent

passage of Public Act 285 and its impact on the status of the Pharmacy Technician job classification in the existing bargaining unit. (Tr. 59, 139). Only Ms. Jordan chose to attend.

During the meeting, Ms. Jordan was informed that Public Act 285 required pharmacy technicians to become licensed by the State of Michigan. (Tr. 20, 28; R Ex. 10). This meant that a new job and a new job description had to be created containing the state law requirements. Ms. Jordan was informed that this new position of Licensed Pharmacy Technician would necessarily be excluded from the bargaining unit under Recognition Clause. (Tr. 20, 28). Ms Jordan testified that following the October 20, 2014 meeting, “it was my understanding that they [the Licensed Pharmacy Technicians] wouldn’t be part of the bargaining unit.” (Tr. 30).

At the October 20, 2014 meeting, Ms. Jordan requested that the Union and SJMO hold a special conference to further discuss the “impact” of the licensing requirements. (R Ex. 3; Tr. 20-21, 141-42). That same day, Ms. Jordan informed Mr. Bass that she met with the Hospital regarding the Licensed Pharmacy Technicians and that a special conference needed to be scheduled to discuss the exclusion of the licensed job classification from the existing unit. (Tr. 41-42, 60).

ii. November 7, 2014: The Union Is Informed Again That The Licensed Pharmacy Technician Position Would Be Excluded From The Bargaining Unit By Operation of the CBA

On November 7, 2014, the Hospital met again with the Union to discuss the Licensed Pharmacy Technician job and its exclusion from the bargaining unit. (Tr. 21; R Exs. 4, 5). Attending the special conference requested by the Union were: Local 1820 President Carlos Bass, Council 25 Representatives Mel Brabson and Jimmy Hearn, Local 1820 Secretary-Treasurer, Toni Jordan, SJMO Executive Director of Human Resources Ane McNeil, SJMO HR Business Partners Virginia Chambo and Ben Carravallah, and outside counsel. (Tr. 21; R Ex. 4).

At the November 7 meeting, SJMO advised the Union that Public Act 285 mandated that all pharmacy technicians practicing in the State of Michigan obtain a state-issued license. (Tr. 33, 55, 61, 148; R Ex. 18). A new job would be posted and new job description would be created to reflect and include the State Law licensing and other requirements. The Union was told that “the collective bargaining agreement excludes licensed associates from the AFSCME collective bargaining agreement.” (Tr. 148). Even though the collective bargaining agreement mandated the exclusion of the licensed position from the existing unit, SJMO advised the Union that it would consider any requests the Union had regarding the impact of the licensing requirement. (Tr. 142; R Ex. 17).

During the November 7, 2014 meeting, the Union asked SJMO to disregard the express language of the CBA and allow the new Licensed Pharmacy Technician job to be included in the unit. (Tr. 148). The Hospital declined the request, as “it’s clear in the recognition clause that they would be excluded, and so following the contract, we [the Hospital] would be in violation of the contract if we did that.” (Tr. 148).

At the conclusion of the November 7, 2014 meeting, the Union had clear and unequivocal notice of all of the matters contained in its unfair labor practice charge. On that date, AFSCME Council 25 Representative Jimmy Hearn declared that the parties “have a dispute” regarding the exclusion of the Licensed Pharmacy Technician job classification from the unit. Mr. Hearn requested that the Hospital agree to expedited arbitration so that the parties could promptly resolve the dispute. (Tr. 61; R Ex. 18). The Hospital agreed to do so. The Hospital agreed to hear any grievance at the final Step 3 of the grievance process, allowing the Union to skip Steps 1 and 2. (Tr. 149; GC Ex. 10).

iii. November 14, 2014: The Union Confirms In Writing Its Understanding That the Licensed Pharmacy Technician Position Would Be Excluded From the Unit

By letter dated November 14, 2014, the Union acknowledged its understanding from the November 7, 2014 special conference that the “law will require Pharmacy Technicians to be licensed.” The Union acknowledged it was told that the newly created job “would be removed from the bargaining unit based on the language in the collective bargaining agreement.” (R Ex. 7). The Union stated that the Hospital “surmised they [the Pharmacy Technicians] would be removed from the bargaining unit based on the language in the Collective Bargaining Agreement but we believe the opposite.” (Id.).

The Union also reiterated its intent to file a grievance regarding the exclusion of the Licensed Pharmacy Technician job classification and proceed directly to Step 3 of the grievance procedure. (R Ex. 7).

iv. December 19, 2014: The Hospital And Union Meet Again To Discuss The Effects Of The Exclusion Of The Licensed Pharmacy Technician Position From The Existing Bargaining Unit

On December 19, 2014 the Union and Hospital held another special conference to discuss the impact of Public Act 285 on the Pharmacy Technician job classification. The State of Michigan delayed the implementation date for pharmacy technicians to obtain a state-issued license from December 2014 to June of 2015. The Hospital called the special conference to inform the Union of the revised effective date of the law and address any Union questions. (Tr. 155; R Ex. 8). During the meeting, the Union did not propose any options with respect to the impact that the licensing requirement or revised implementation date would have on the pharmacy technicians. (Tr. 155).

Even though the effective date of the licensing requirement was delayed, pharmacy technicians were still required to obtain the pharmacy technician license from the State of

Michigan. There was also no change in the requirement that the new Licensed Pharmacy Technician position would be excluded from the unit. (Id).

E. March 10, 2015: The Union Files Its Grievance Regarding the Pending Exclusion of the Licensed Pharmacy Technician Position

Pursuant to the Hospital's November 7, 2014 agreement to expedited arbitration, on March 10, 2015, the Union filed an Official Grievance Form ("Grievance") with SJMO entitled "Pharmacy Technicians." (R Ex. 12; Tr. 202). The Grievance alleged that the Hospital violated "Article I Section 1 Recognition, Article XVIII and any state and federal laws that may apply." Specifically, the Union alleged that "Associates at all cost[s] would like to remain in the current bargaining unit. The associates have been covered under A.F.S.C.M.E. local 1820 since 1971." (R Ex. 12). The Union requested that the Hospital "make associates 100% whole" and "cease and desist the removal of techs from bargaining unit." (R Ex. 12).

On April 9, 2015, the parties held a Step 3 grievance meeting to discuss the March 6 grievance filed by the Union. (R Ex. 13). At the outset of the meeting, Mr. Bass declined to articulate any specific contract violation or present any statements regarding the grievance. (Tr. 204). Mr. Bass stated that the Union would not offer any evidence or arguments in support of the grievance. (Id). Instead, Mr. Bass told the Hospital to just "respond" to the written grievance. (Id).

On May 4, 2015, the Hospital denied the grievance. SJMO informed the Union that PA 285 required that the pharmacy technicians obtain and possess a state issued license to perform their duties. (R Ex. 13). The grievance was denied because the CBA required the exclusion of licensed job classifications from the unit:

The collective bargaining agreement is clear. Licensed associates are excluded from the bargaining unit.

Based on the requirements of Michigan law, effective June 30, 2015 the job descriptions and titles for non-licensed “Pharmacy Technician In-Patient” and non-licensed “Pharmacy Technician Out-Patient” will be eliminated. In advance of that date, the Hospital will post and fill the role of “Licensed Pharmacy Technician Specialist” which complies with the Michigan licensing law. Under the plain language of the collective bargaining agreement, the Licensed Pharmacy Technician Specialist role will not be included in the bargaining unit. The grievance is denied.

(R Ex. 13).

F. May 6, 2015: The Union Files An Intent To Arbitrate Over The Exclusion Of The Licensed Pharmacy Technician Position But Never Advances The Grievance To Arbitration

Although a grievance was filed, AFSCME Council 25 decided not to advance the grievance challenging the exclusion of a licensed job from the bargaining unit.

On May 6, 2015, Ms. Jordan notified SJMO of AFSCME Local 1820’s preliminary intent to arbitrate the parties’ dispute regarding exclusion of the Licensed Pharmacy Technician job classification from the existing bargaining unit. (R Ex. 9). Article VI Section 7 of the CBA required the AFSCME Council 25 Arbitration Department to give notice within 60 days if it decided to arbitrate the grievance. (GC Ex. 10).

The AFSCME Arbitration Department allowed the 60 day period to expire without giving notice of any determination to proceed to arbitration. The decision to not advance the grievance to arbitration resulted in the grievance being closed. (Tr. 164).

G. Pharmacy Technicians Apply For And Obtain New Positions

Following the passage of Public Act 285, the Hospital was in frequent communication with the Pharmacy Technicians regarding the impact the licensing requirement would have on their jobs. The Hospital issued a series of FAQs to the Pharmacy Technicians “to inform them of the new change in law, the requirements of licensure, and make sure they had information

regarding the change.” (Tr. 156; R Ex. 11). The FAQs also advised the Pharmacy Technicians of the revised deadlines for obtaining the license. (Tr. 157, 159; R Ex. 11).

SJMO advised the Pharmacy Technicians that the Hospital would create a new Licensed Pharmacy Technician job classification to ensure compliance with PA 285 prohibition on unlicensed individuals performing pharmacy technician work. The Hospital informed the Pharmacy Technicians that they had to meet the requirements of and apply for the licensed position if they wanted to continue performing pharmacy technician work. (R Ex. 11). Pharmacy Technicians who failed to obtain the state-issued license by the effective date would be “removed from the schedule and will be subject to termination of employment.” (Id).

On September 17, 2015, SJMO advised the pharmacy technicians that effective October 1, 2015, they needed to obtain a state-issued license and apply for the new Licensed Pharmacy Technician job. (R Ex. 11). Even though Pharmacy Technicians were given the opportunity to apply for the new Licensed Pharmacy Technician position, SJMO did not mandate the Pharmacy Technicians apply for the licensed position in order to continue their employment at the Hospital. (Tr. 81-82). These employees were given the option to apply for any job in the Hospital, including open bargaining unit jobs. (Tr. 82). However, every Pharmacy Technician in the unlicensed pharmacy technician position elected to apply for and go into the non-bargaining unit licensed position upon obtaining their state-issued license.

By the end of September, 2015, all 29 Pharmacy Technicians obtained a license from the State of Michigan and satisfied the requirements for the Licensed Pharmacy Technician job. Each Pharmacy Technician applied for the open Licensed Pharmacy Technician job and were given offers of employment for their new role. (Tr. 164, 206; R Ex. 16).

H. The Hospital Followed The Parties' Longstanding Practice Of Moving Individuals Into And Out Of The Unit Based On The Recognition Clause

The exclusion of Licensed Pharmacy Technicians from the bargaining unit is consistent with the practice of the parties to exclude other licensed associates. The un rebutted evidence showed that at least 29 SJMO employees who once held bargaining unit positions came out of the bargaining unit when they obtained a license. (R Ex. 14). Further, SJMO placed two employees back into the unit after they failed their licensing tests. (R Ex. 15).

One of the most common transitions between union and non-union positions involve the Patient Care Associate and Licensed Nurse job classifications. Both positions require assisting patients with activities of daily living (ADLs), conducting vitals, proving day-to-day nutritional needs, and following-up with a physician to obtain information. (Tr. 190). The Patient Care Associate position is a non-licensed position that is included in the bargaining unit. However, the Registered Nurse job classification requires a state-issued license and is excluded from the bargaining unit.

When a Patient Care Associate takes a nursing exam and obtains a state-issued license, the employee is transitioned into a licensed role and comes out of the bargaining unit. (Tr. 189; R Ex. 14). Even though there are overlapping duties between the Patient Care Associates and licensed Nurses, the Union has never objected to SJMO moving a Patient Care Associate out of the bargaining unit after that individual moves into a licensed nursing position. (Tr. 138).

The parties also follow the Recognition Clause by moving SJMO employees into the Union if an employee fails to obtain a state-issued license. On at least two occasions, SJMO employees who completed their educational requirements for a nursing position were moved out of the unit and placed into graduate nurse roles while they were in the process of obtaining a

license. (Tr. 192; R Ex. 15). When these individuals failed their licensing test from the State of Michigan, they were placed back into a bargaining unit position as a Patient Care Associate. (Id).

I. The Licensed Pharmacy Technician Position Requires New Responsibilities And Added Duties

The pharmacy technician occupation has undergone “substantial” changes since the State of Michigan required pharmacy technicians to obtain a state-issued license. (Tr. 101). Prior to the licensing requirement, the pharmacy technician occupation was unregulated and did not require any minimum level of proficiency. (Tr. 90-1). Pharmacy technicians received on-the-job training and were limited in the areas and operations in the pharmacy. (Tr. 94-95). The lack of regulation and established standards in the pharmacy industry led to a deadly outbreak of meningitis from the New England Compounding Center in 2014. (Tr. 89-90). In fact, Michigan had one of the highest numbers of patients in the United States who died or suffered severe injuries from the New England Compounding Center antibacterial contamination. (Id).

The pharmacy technician licensing requirement seeks to avoid catastrophic incidents similar to those in the New England Compounding Center incident by setting forth stringent regulations and enforcement mechanisms for the pharmacy technician occupation. (Tr. 91-95). Pursuant to Public Act 285, the Michigan Department of Licensing and Regulatory Affairs (“LARA”) is responsible for the regulation and enforcement of the pharmacy technician licensing requirements. (Tr. 91; GC Ex. 10). LARA utilizes United States Pharmacopeia (“USP”) 797 guidelines for the regulation and enforcement of the pharmacist technology occupation in Michigan. (Tr. 91).

Through the passage of Public Act 285, the job requirements for the pharmacy technicians are now set by the State of Michigan. (Tr. 96). These new state-mandated job

requirements have legally compelled significant changes in the pharmacy technician occupation at SJMO:

- Pharmacy technicians licensing now permit them to operate in different areas of the pharmacy that they were not qualified to prior to licensing. (Tr. 94).
- Licensed Pharmacy Technicians at SJMO now conduct investigations into controlled drug discrepancies to determine whether there has been any unauthorized misappropriation of narcotics. (Tr. 112-13).
- Licensed Pharmacy Technicians in the retail pharmacy now utilize a “perpetual inventory system.” (Tr. 86-7). The perpetual inventory system allows the SJMO retail pharmacy to keep a running total of its inventory and automatically reorder products so that it does not keep unnecessary inventory. (Id).
- Licensed Pharmacy Technicians are now required to undergo retraining and recertification measures in order to ensure compliance with the USP 797 standards that are enforced by LARA. (Tr. 92).
- Licensed Pharmacy Technicians are now required to follow different safety requirements for donning clothing and equipment. (Tr. 92-3).
- Licensed Pharmacy Technicians must conduct sterile fingertip testing to ensure that there is no contamination in sterile compounding and IV rooms. (Tr. 108).
- LARA mandates revised cleaning techniques that were not required prior to the licensing requirement. (Tr. 92, 107-8).
- Licensed Pharmacy Technicians must now pass a criminal background check prior to licensing. (Tr. 114).

Licensing of pharmacy technicians “has elevated the profession” in multiple respects. (Tr. 94). The new licensing requirement shifted the focus of the occupation to clinical care. The new clinical care focus resulting from the licensing requirement mandates that pharmacy technicians “are responsible for the outcomes of the medication use on the patient, the clinical process that’s going on, and we have to have personnel that are knowledgeable and competency assessed in order to do this.” (Tr. 95).

LEGAL ARGUMENT

I. THE ALJ ERRED IN DETERMINING THAT THE UNION'S UNFAIR LABOR PRACTICE WAS TIMELY FILED

The Union's filing of the unfair labor practice in this matter is untimely. On October 20, 2014, SJMO provided the Union with clear and unequivocal notice that the new Licensed Pharmacy Technician was not included in the unit because the recognition clause of the CBA excluded licensed positions. The Hospital again informed the Union that the Licensed Pharmacy Technician position is excluded from the unit on November 7, November 14, and December 19, 2014. On March 10, 2015, the Union filed a grievance complaining of the same conduct that is alleged in this case. The Union does not dispute these facts or that it had clear and unequivocal notice on these dates.

The Union filed its unfair labor practice charge in this case on October 5, 2015, almost a year after SJMO first informed the Union that the new Licensed Pharmacy Technician was excluded from the unit pursuant to the express terms of the CBA. The Union's charge was not timely and the ALJ ignored well-settled Board law and the undisputed record evidence when she found that the Union's charge was not time-barred by Section 10(b) of the Act.

A. The Limitations Period Began When The Union Received Notice of the Exclusion of the Job Classification

Section 10(b) of the Act provides that "no complaint shall be based upon *any* unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b) (emphasis added).

It is well settled that the six month limitations period prescribed by Section 10(b) begins to run when a party has clear and unequivocal notice, either actual or constructive, of the violation of the Act. *Art's Way Vessels, Inc.*, 355 NLRB 1142, 1147 (2010). "It is the date of the allegedly unlawful act rather than a proposed effective date that will trigger the sixth-month

period. The Board holds that the Section 10(b) period will begin to run when a party is on notice of facts that would ‘reasonably engender suspicion’ of an unfair labor practice.” *United States Postal Service Marina Mail Processing Center*, 271 NLRB 397, 400 (1984) (emphasis added); see also, *NLRB v. Manitowoc Engineering Co.*, 909 F.2d 963 (7th Cir. 1990) (“The Board construes section 10(b) to start the limitations clock from the date a final and unequivocal adverse employment decision is made and communicated to an employee”); *The Developing Labor Law* at pgs. 2854-2855.

In *Postal Service*, *supra*, the Board reversed its prior decisions in *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enf. denied in relevant part *sub nom. Nazareth Regional High School v N.L.R.B.*, 549 F.2d 873 (2d Cir. 1977), and *California School of Professional Psychology*, 227 NLRB 1657 (1977), enf. denied 583 F.2d 1099 (9th Cir. 1978). These prior decisions had held that “the Board has construed the 10(b) period to begin not from the time an employee receives unequivocal notice of an adverse employment action, but instead from the time the action becomes effective.” *Id.* at 398. In *Postal Service* the Board agreed with the circuit court opinions in *Nazareth* and *California School*, and held that the date which begins the six month limitations period is when the injured party receives unequivocal notice of the alleged unfair labor practice. *Id.*

In *Postal Service*, the Board also followed the U.S. Supreme Court decisions in *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and *Chardon v. Fernandez*, 454 U.S. 6 (1981). The Board concluded that, “[w]here a final adverse employment decision is made and communicated to an employee – whether the decision is nonrenewal of an employment contract, termination, or other alleged discrimination – the employee is in a position to file an unfair labor practice charge

and must do so within 6 months of that time rather than wait until the consequences of the act become most painful.” *Id.* at 400 (emphasis added).

The Board stated:

Section 10(b) of the National Labor Relations Act provides in pertinent part “[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge.” We think the Supreme Court’s rationale in construing the limitations periods for alleged unlawful employment discrimination under Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983, applies with equal force to unfair labor practice cases under our Act. As indicated above, courts of appeals have applied the same reasoning to NLRB cases arising before *Ricks* and *Chardon*.

Id. at 399.

The ALJ misapplied the law by finding that the Section 10(b) limitations period started on the date the Licensed Pharmacy Technicians did not have dues deducted from their paychecks. The correct date was October 20, 2014, the date which the Union acknowledged it had clear and unequivocal notice.

B. The ALJ Misapplied That Facts To The Law In Concluding That The Complaint Was Timely Filed

The ALJ correctly stated in her Decision that the test for when an unfair labor practice occurs is when there is a “clear and unequivocal notice of a violation.” (ALJD p. 8, lines 38-39). That date was October 20, 2014, the day when the Hospital first notified the Union of the new Licensed Pharmacy Technician position, and the requirement that the Hospital follow the CBA’s requirement to exclude licensed employees from the unit. The ALJ then inexplicably ignored the law and found the allege unfair labor practice occurred on the day the Hospital did not deduct union dues for the Pharmacy Technicians who were employed in the new Licensed Pharmacy Technician positions. The ALJ recognized the correct “clear and unequivocal notice of the violation” standard, but erroneously applied this standard to the undisputed facts.

The Union admitted at the hearing that it had “clear and unequivocal notice” that the Licensed Pharmacy Technician job classification would be excluded from the bargaining unit nearly one year before filing the charge. The Union’s own statements and admissions throughout its year-long discussions with the Hospital confirm that its October 5, 2015 unfair labor practice charge is untimely:

- **October 20, 2014:** AFSCME Local 1820 Secretary/Treasurer, Toni Jordan, is informed about the passage of Public Act 285, that SJMO was creating a new Licensed Pharmacy Technician position and that the Hospital was required by the terms of the CBA to exclude Licensed Pharmacy Technicians from the unit. Ms. Jordan testified that based on this conversation, “it was my understanding that they [the Licensed Pharmacy Technicians] wouldn’t be part of the bargaining unit.” (Tr. 30).
- **November 7, 2014:** SJMO and Union leadership hold a special conference to discuss the exclusion of the Licensed Pharmacy Technician position. AFSCME Local 1820 President, Carlos Bass, testified that he was told during this meeting that upon licensure under the contract, pharmacy technicians would come out of the unit upon being hired into the licensed position. (Tr. 60-1). AFSCME Council 25 Representative, Jimmy Hearn, also stated that the parties “have a dispute” regarding their stated positions with respect to the Licensed Pharmacy Technicians’ exclusion from the unit. (R Ex.17).
- **November 14, 2014:** The Union confirms its understanding that the Licensed Pharmacy Technicians would be excluded from the unit in a letter from Council 25 Representative, Melvin Brabson, to SJMO VP of Human Resources Administration, Ane McNeil. (R Ex. 7). Mr. Brabson stated, “[y]ou surmised they would be removed from the bargaining unit based on the language in the Collective Bargaining Agreement but we believe the opposite.” (Id).
- **December 19, 2014:** The Union and SJMO leadership hold a special conference to discuss the delayed implementation date of the pharmacy technician licensing requirement. (R Ex. 8). The Hospital reiterates that the Pharmacy Technician position will be excluded from the unit upon licensure.
- **March 10, 2015:** The Union files an Official Grievance regarding the “removal of tech from bargaining unit.” The Union

affirmatively states that Article 1 Section 1 of the collective bargaining agreement was violated as of this date. (R Ex. 12).

As set forth above, the alleged unfair labor practice occurred in October 2014, when SJMO informed the Union that the Hospital was creating a new position of Licensed Pharmacy Technician and that the recognition clause of the CBA excluded licensed employees from the unit. The Union admitted to having clear and unequivocal notice that the Licensed Pharmacy Technicians would be excluded from the bargaining unit pursuant to the terms of the CBA.

At the very latest, the Union displayed clear and unequivocal notice of the alleged unfair labor practice on March 10, 2015, the date it filed a grievance contesting the exclusion of the Licensed Pharmacy Technicians from the unit. The Union's October 5, 2015 unfair labor practice in this matter was filed beyond the six-month limitation mandated by Section 10(b). The unfair labor practice charge upon which the Complaint is based was untimely and should be dismissed.

In finding that the Union's unfair labor practice charge was timely filed in this case, the ALJ concluded that the unfair labor practice "occurred" on October 1, 2015, the date SJMO stopped deducting dues for the Pharmacy Technicians who had moved into the Licensed Pharmacy Technician classification. The ALJ ignored the holding in *Postal Service* that the period begins on the date of clear notice of the complained-of decision, not the date the impact or consequences of the decision are felt. Instead, the ALJ relied upon an erroneous reading and application of *Leach Corp.*, 312 NLRB 990 (1993) to support her conclusion.

In *Leach*, the union filed an unfair labor practice charge alleging that after the employer relocated to a new facility it unlawfully refused to recognize the union. The employer claimed the charge was untimely because it gave notice to the union that it would be relocating more than six months before the charge was filed.

The Board found that the charge alleging a duty to recognize the union would not be ripe until the union knew that a “substantial percentage” bargaining unit employees would be transferred to the new location. The Board held that the employer would not be required to recognize the union unless the “transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement.” This information, the number of transferees, was not known or made clear to the union until late in the process, when 280 of the 340 employees were transferred to the new plant. Prior to that time, the union did not have clear or unequivocal notice that the employer would have a duty to recognize it and accept the collective bargaining agreement at the new facility. Indeed, if the employer had not transferred a substantial percentage to the new plant, there would have been no duty to recognize the union and no basis for the unfair labor practice charge. Since the union did not know how many employees would be transferred when the employer made its initial announcement, the charge was not untimely.

In *Leach*, there were facts that had to be developed and events that had to be solidified, one way or another, before clear notice of a charge was present. In this case, there were no facts that needed to be developed. Nothing was unclear or ambiguous about what was going to happen. At the first meeting with the Union on October 20, 2014, the mandates and licensing requirements of PA 285 were known and made clear. The Union admits that it was told that based on this law the pharmacy technician position would be a licensed job and mandatorily excluded from the unit under the Recognition Clause.

The Union witness’s testimony and its own actions, including filing a grievance, show that it had clear notice and knowledge that the licensed Pharmacy technician job would not be included in the unit. There were no conditions that needed to be satisfied. There were no

reservations, no scenarios that had to play out, and no ambiguities that needed to be resolved. This notice was clear, unequivocal, and acknowledged by the Union.

II. THE ALJ ERRED IN DECIDING THAT THE HOSPITAL VIOLATED SECTIONS 8(a)(1) AND (5) OF THE ACT

The ALJ relied on a faulty and unsupported premise that the Pharmacy Technician classification and work was *removed* from the bargaining unit in violation of Sections 8(a)(1) and (5) of the Act. (ALJD at p. 13, lines 18-20). In reaching this erroneous conclusion, the ALJ disregarded the plain and ordinary meaning of the contract and relied on Board precedent which involved materially distinguishable facts. It is undisputed that the State of Michigan mandated that pharmacy technician work be performed by licensed employees and the parties' CBA excludes licensed employees from the unit. Nothing was "removed" from the bargaining unit.

If the ALJ's Decision is affirmed and adopted, the Board would require the Hospital to violate the terms of the CBA's recognition clause by ordering that *excluded* licensed associates be *included* in the unit. This result is contrary to the explicit language in the CBA, the undisputed facts, Board precedent, and common sense.

A. The ALJ's Decision Disregarded The Plain Meaning Of The Recognition Clause In Concluding That The CBA Does Not Require The Exclusion Of Licensed Pharmacy Technicians From The Bargaining Unit

The Board has consistently held that the ordinary, plain meaning of a contract term is paramount in determining its meaning. See *Mining Specialists*, 314 NLRB 268, 269 (1994). An employer who fails to apply the plain terms of a collective bargaining agreement to unit employees violates Sec. 8(a)(1) and (5) of the NLRA. The Board will follow the parties' unequivocal contract language when interpreting the parties' bargaining unit description. *Gourmet Award Foods*, 336 NLRB 872, 873 (2001) (finding contractual union description clearly and unequivocally compelled inclusion of warehouse men into the bargaining unit).

The contractual obligation to exclude job classifications that do not meet the definition of the bargaining unit has long been recognized by the NLRB.

In *The Boeing Company*, 212 NLRB 116 (1974), the CBA between the employer and union covered “professional engineers.” When the employer discovered that 54 employees who were engaged in computer work mistakenly had been given titles which indicated that they performed professional engineering work, it changed their job titles to accurately reflect work that they perform by removing the “professional” title. Because the employees were not performing “professional engineering” work, the employer excluded them from the bargaining unit. The union filed a charge with the NLRB alleging that the change in job titles and resultant exclusion from the bargaining unit was an unlawful unilateral alteration in the scope of the bargaining unit. The Board rejected this argument, stating “we find that no alteration in the scope of the SPEEA unit has occurred by virtue of their reclassification, and that, in reclassifying the employees as it did, Respondent's action was not in derogation of any bargaining obligations imposed upon it by Section 8(a)(5) of the Act.” *Id.*

Even though Board precedent mandated that the ALJ apply the clear and unambiguous terms of the CBA, which explicitly excludes *licensed* associates and job classifications from the bargaining unit, the ALJ failed to do so. In the Decision, the ALJ stated that the CBA’s recognition clause does not require “Respondent to exclude the licensed pharmacy technician from the bargaining unit.” (ALJD p. 11, lines 22-24). This conclusion contradicts and ignores the plain text of the recognition clause.

The ALJ’s clear misreading and misunderstanding of the terms of the CBA warrant a reversal of her Decision. The Hospital followed the terms of the CBA and did not commit the alleged unfair labor practice.

B. The ALJ Erroneously Concluded That the Pharmacy Technician Position And Work Was Removed From The Bargaining Unit

Having disregarded the plain language of the CBA in finding that the Licensed Pharmacy Technician position was not excluded from the bargaining unit, the ALJ instead focused the analysis on whether the Pharmacy Technician position and its work was “removed” from the unit. (ALJD p.11, lines 1-20; p. 12, lines 15-26).

After the passage of PA 285, the old Pharmacy Technician job was no longer viable or permissible. A new position that required all of the state mandated licensing requirements had to be established. This job, by operation of contract, was required to be outside the bargaining unit. The old job became obsolete. It was not “removed.”

Even if this obsolete job could be said to have been “removed,” exclusion from the unit *requires* removal from the unit. In other words, since licensed jobs must be excluded, they must also be removed from the unit.

In support of her reasoning, the ALJ relied on *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982), *enfd.* 721 F.2d 187 (1983). *Bay Shipbuilding* is factually inapposite and has no applicability to this case.

In *Bay Shipbuilding*, the employer created a computer lofting position. The employer designated this position non-union and offered it to union employees in the manual lofting position. The decision to create a non-union position was made by the employer after its representatives concluded that the manual lofting employees should have never been included in the bargaining unit. *Id.* at 1139. The ALJ rejected the employer’s attempt to do so, finding that unlike this case, there was nothing in the recognition clause or elsewhere that permitted this action. The ALJ held that there is “nothing in the collective bargaining agreement between Respondent and the Union which authorizes the Respondent to unilaterally redesignate unit work

as nonunit, and I find nothing therein to suggest that the Union has waived its right to represent unit employees now or at any time in the future.” *Id.* at 1140-41 (emphasis added). In affirming the ALJ’s decision, the Board noted that “the Respondent’s motive for excluding computer loft employees from coverage under the bargaining agreement was a desire to separate these employees from the remaining loft employees and other employees forming a common seniority pool created for purposes of layoff and recall.” *Id.* at 1133.

Unlike this case, the recognition clause in *Bay Shipbuilding* did not expressly authorize the exclusion of computer jobs from the bargaining unit. Here, the recognition clause mandates the exclusion of licensed jobs. The parties have long-abided by this mandate in moving employees out of and back into the unit, depending on whether the work requires a license. There is no evidence in the record that the Hospital believed that the Pharmacy Technicians were improperly classified in the past or some other nefarious motive. By law, the work performed by pharmacy technicians cannot be done without a license. The Hospital simply followed the law and the terms of the CBA.

The holding and analysis of *Bay Shipbuilding* is limited to situations where an employer takes unilateral action to create a non-union job without authority in the recognition clause or in law. That is not the case here. *Bay Shipbuilding* is not applicable and this Board should reject the ALJ’s effort to apply it to the undisputed facts of this matter.

C. The Licensed Pharmacy Technician Position Is Sufficiently Dissimilar From The Unlicensed Position

The ALJ made incorrect and unsupported determinations that the Licensed Pharmacy Technician position was not sufficiently dissimilar from the unlicensed Pharmacy Technician position.

The ALJ erred in failing to credit the Hospital's Director of Pharmacy Services for the East Market, Kathleen Gaither, that the licensing requirements "has elevated the profession" in multiple respects. (Tr. 94). While the ALJ relied heavily on union witness testimony with respect to pharmacy technician job duties immediately after the licensing requirement went into effect, she failed to give any credit to the overall impact of the licensing requirement on the overall job duties of pharmacy technicians.

The Licensed Pharmacy Technician position has undergone and will continue to undergo significant changes in job duties as a result of the licensing requirement. The ALJ erred in failing to properly credit these facts in concluding that the pharmacy technician position before and after licensure are not dissimilar.

Ms. Gaither testified that the new licensing requirement shifts the focus of the occupation to clinical care. The new requirements mandate that pharmacy technicians be "responsible for the outcomes of the medication use on the patient, the clinical process that's going on, and we have to have personnel that are knowledgeable and competency assessed in order to do this." (Tr. 95).

The evidence shows that with the advent of licensure and regulation by the State of Michigan, the work has changed and will continue to change based on the requirements of LARA and the Michigan Board of Pharmacy. By law, there are no circumstances under which this work can be performed by an unlicensed individual. The state now sets the qualification standards and educational requirements for performance of the work. The state will have enforcement and disciplinary power over pharmacy technicians. Individuals who do not possess or lose their license will not be allowed to perform the job. This is not the same work or job that was previously performed by unlicensed and therefore included bargaining unit employees.

D. The Specific Inclusion Of The Boiler Operator and Electrician Positions In The Recognition Clause Is Irrelevant

The ALJ engaged in unsupported and contradictory reasoning finding that since Boiler Operators and Electricians were included in the bargaining unit, Licensed Pharmacy Technicians should also be included. (ALJD p.12, lines 9-10).

The Recognition Clause specifically calls out and includes two licensed positions that have always been included in the unit: Boiler Operator and Electrician. These jobs required licensure before the first CBA was bargained. The parties chose in the very first contract to include these two job titles in the unit. After identifying these jobs as included, the Recognition Clause goes on to unmistakably exclude all other “licensed associates.” The references to and inclusion of these specifically identified jobs is irrelevant to the facts and circumstances in this case.

The ALJ initially characterized the inclusion of these positions in the bargaining unit as “irrelevant.” (ALJD p.12, lines 14-15). The ALJ then argued that the proper focus was “whether the duties of the licensed pharmacy technicians are sufficiently dissimilar to the bargaining unit positions.” (ALJD p.12, lines 15-16). As discussed, this analysis is unsupported and inapplicable as a matter of law.

III. THE ALJ’S ERRONEOUS CONCLUSION THAT THE UNION DID NOT WAIVE ITS RIGHT TO BARGAIN IS CONTRARY TO BOARD PRECEDENT

The ALJ erred in determining that the Union did not waive its right to bargain over the exclusion of the Licensed Pharmacy Technician position. (ALJD, pp. 12-13). In the Decision, the ALJ stated that a waiver is effective when it is “clear and mistakable.” (ALJD, p. 12, lines 34-36). The “‘clear and unmistakable’ standard requires that the contract language is specific, or it must be shown that the subject alleged to have been waived was fully discussed by the parties

and the party alleged to have waived its right did so explicitly and with the full intent to release its interest in the matter.” (ALJD, pp. 12-13, lines 43-2), citing *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 708 (1983).

The Board has recognized that a union waives its right to challenge the definition of a bargaining unit where it previously agreed to the proper scope of the unit. *See e.g., Knoxville News Sentinel Co.*, 327 NLRB 718 (1999) (the union waived the right to object to removal of jobs from the bargaining unit where it never requested bargaining over scope of recognition clause).

Here, the Union and the Hospital bargained over and agreed to the definition of the unit. The parties’ recognition clause could not be more clear in excluding licensed associates. This definition has been followed by the parties since it was agreed to in 1971.

The ALJ failed to apply the Board’s long-standing precedent by contorting the clear language of the recognition clause which excludes licensed associates. While recognizing that the CBA excludes “licensed associates,” the ALJ reasoned that the CBA does not exclude “licensed pharmacy technicians.” (ALJD p. 13, lines 6-8). This hyper-technical interpretation is erroneous and illogical. The parties do not dispute that the term “associates” is synonymous with “employees.” None of the parties in this case have argued otherwise. Indeed, adopting the ALJ’s reasoning would render ineffective any effort by the parties to include or exclude broad categories of employees from representation. The parties have understood this broad exclusion to apply to over 1,100 licensed employees in jobs that are not included in the unit. The parties have also abided by this exclusionary language in moving employees out of the unit when they move into licensed jobs. The ALJ ignored the record evidence and improperly substituted her own judgment for that of the parties. Her decision should be rejected.

Finally, it cannot be disputed that the Recognition Clause is a permissive subject of bargaining. *Hampton House*, 317 NLRB 1005, 1005 (1995). SJMO is not required to bargain over whether the Licensed Pharmacy Technician job classification should be included in the bargaining unit. The parties' agreement in 1971, and in each subsequent CBA, to exclude licensed associates from the bargaining unit is clear and unmistakable. The ALJ erred in concluding otherwise.

CONCLUSION

For the reasons set forth above, the underlying charge was filed outside the statutory limitations period required by Section 10(b) of the Act. The Complaint must be dismissed on this basis alone. Even if the Union's charge was timely, Counsel for the General Counsel and the Union have failed to meet their burden of establishing that the Hospital committed an unfair labor practice when it followed the express terms of the collective bargaining agreement. The ALJ's Recommended Decision and Order should be rejected and the Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the forgoing document was filed with the National Labor Relations Board through the NLRB's Electronic Filing System, and served upon other counsel to this matter, as listed below, by electronic mail on July 24, 2017:

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